CHENG SWEE HOCK

v.

MAT SAAD BIN DARUS & ANOR.

HIGH COURT MALAYA, ALOR SETAR
TUAN K. N. SEGARA JC
[CIVIL NO: 77 OF 1993]
25 JULY 1995

TORT: *Negligence - Collision between motorcycle and lorry - Pleadings indicating uncertainty how accident occurred - Contradictory oral evidence - Whether plaintiff proceeding from same or opposite direction as lorry - Reliability of witnesses - Liability - Personal injuries - Quantum of damages.*

The plaintiff claimed damages for personal injuries suffered as a result of a collision between his motorcycle and a lorry driven by the 1st defendant.

According to the plaintiff's statement of claim, the plaintiff was riding along Jalan Tunku Putra towards Kulim when the lorry driven by the 1st defendant collided into him from the opposite direction. The particulars of negligence had a similar assertion as did the police report lodged by the plaintiff. The 1st defendant's police report also stated that the plaintiff was travelling from Kelang Lama to Pekan Kulim and further claimed that the plaintiff had overtaken a motorvespa ahead of the plaintiff, grazed the motorvespa, swerved from side to centre, encroached into his path and knocked into the lorry.

At the trial, plaintiff's Counsel applied to orally amend para. 4 of the statement of claim to read "same" instead of "opposite" which amendment was allowed but no corresponding amendment was made to the particulars of negligence. The plaintiff's oral evidence was that he was riding in the same direction as the lorry when he heard a sound "plump" after which he lost consciousness. Under cross-examination he stated he could not remember when it was put to him that he was coming from the opposite direction and overtaking a motorvespa but upon re-examination he stated that he was very sure he was knocked from the rear and did not overtake a motorvespa. PW3, called to support the plaintiff's evidence, stated that he saw the plaintiff stop at the pedestrian crossing when the lorry collided into the plaintiff's motorcycle from the rear. PW3 also stated that he heard the lorry driver say that the brakes of the lorry were not good.

The issues were whether the plaintiff was travelling from the opposite direction of the lorry prior to the accident and whether the testimonies of the witnesses were reliable.

Held:

[1] PW3 stated that he saw the collision to the rear of the plaintiff's motorcycle when it was stationary. However, a stationary object not firmly rooted to the ground when knocked by a moving heavier object would inevitably be flung some distance in front of the moving object or dragged along with it. But as seen from the police photographs, the motorcycle is in front of the lorry and the RIMV report of the motorcycle seems to reflect greater damage to the front of the motorcycle.

[2] The RIMV report on the lorry also did not corroborate PW3's statement of the alleged faulty brakes. Therefore, PW3 is not a reliable witness nor is the plaintiff who has contradicted himself on several material particulars and reliance must be placed on the silent documentary evidence such as the police reports, sketch plan, key and photographs.

[3] The Court finds as a fact that the plaintiff was not proceeding from Kulim but riding his motorcycle in the direction of Pekan Kulim. Further, that the lorry was proceeding from Kulim in the direction of Kelang Lama and the accident happened wholly on the plaintiff's wrong side of the road based on the silent evidence, particularly the sketch plan. There is no evidence of contributory negligence on the part of the 1st defendant. Thus the plaintiff was the sole author of his misfortune.

[4] The RIMV report on the motorcycle indicates that both the front and rear tyres of the motorcycle were deflated which perhaps contributed to his misfortune in that he was unable to control his motorcycle while overtaking the motorvespa causing him to encroach onto the other lane and collide into the front of the lorry. Accordingly, the plaintiff's claim is dismissed with costs.

[Plaintiff's claim dismissed with costs].

Cases referred to:
Pavone v. Public Prosecutor [1986] 1 MLJ 72 ***(cit)***
Ng Chui Sia v. Maimon bt. Ali [1983] 1 MLJ 110 ***(cit)***
Noor Haiyati bt. Saad & Anor. v. Said bin Ismail T/a Sykt. Noor Jaya [1991] 2 CLJ 1564 ***(cit)***
San Seong Choy & Ors. v. Yuson Bien [1962] 28 MLJ 427 ***(cit)***
Lee Ewe Teik v. Ariffin bin Hussain [1990] 2 CLJ 191 ***(cit)***
Hollington v. Hewthorn & Co. Ltd. [1943] 2 All ER 35 ***(cit)***
Noor Mohamed v. Palanivelu & Anor. [1956] 22 MLJ 114 ***(cit)***
Menon v. Henri Pigeonneau [1957] 23 MLJ 85 ***(cit)***
E.A. Long v. Wong Chiu Wah & Ors. [1957] 23 MLJ 163 ***(cit)***
Chow Kay Kong v. Ching Tong & Ors. [1967] 2 MLJ 31 ***(cit)***
Lim Ah Toh v. Ang Yau Chee & Anor. [1969] 2 MLJ 194 ***(cit)***
Chang Chong Foo & Anor. v. Shivanathan [1992] 2 MLJ 473 ***(cit)***
K.R. Taxi Service Ltd. & Anor. v. Zaharah & Ors. [1969] 1 MLJ 49 ***(cit)***
Lim Kar Bee v. Abdul Latif bin Ismail [1978] 1 MLJ 109 ***(cit)***
Len Omnibus Co. Bhd. v. North South Transport Sdn. Bhd. & Anor. [1978] 2 MLJ 246 ***(cit)***
Rosita bt. Baharom & Anor. v. Sabedin bin Salleh [1992] 1 CLJ 180 ***(cit)***
Mathavan a/l Shunmugam v. Woo Bee Leng [1995] 1 MLJ 841 ***(cit)***
Mohamad Safuan bin Wasidin & Anor. v. Mohd. Ridhuan bin Ahmad [1994] 2 MLJ 187 ***(cit)***
Tey Chan & Anor. v. South East Asia Insurance Bhd. [1993] 3 MLJ 760 ***(cit)***
Pattan a/l Sembadayan v. Periasamy s/o Vellan [1988] 1 CLJ 826 ***(cit)***
Zamri bin Omar v. Idris bin Mohamad Nor [1989] 2 CLJ 267 ***(cit)***
Balakrishnan s/o Kunjamboo Nair v. Savastine Anthony s/o Francis [1991] 1 CLJ 503 ***(cit)***
Tan Lin Siew & Anor. v. Syed Hussein bin Alwi [1987] 2 MLJ 53 ***(cit)***
Thrimalai & Anor. v. Mohamed Masry bin Tukimin [1987] 1 MLJ 153 ***(cit)***

Legislation referred to:
Evidence Act 1950 ss. 74, 76 & 77

For the plaintiff - Darshan Singh; M/s. Darshan Singh & Co.
For the defendants - Andrew Khoo; M/s. Khoo & Sidhu

JUDGMENT

K. N. Segara JC:

This is a claim for damages by the plaintiff who was involved in an accident on 15 March 1978, whilst he was riding motorcycle No. PQ 5871.

The writ was filed by the plaintiff's solicitors M/s. Darshan Singh & Co., on 5 March 1983 against the 1st defendant as the driver of the m/lorry No. AL 6762, and the 2nd defendant as the owner of the m/lorry and the employer of the 1st defendant. At the time of the filing of the writ and statement of claim it was pleaded in paragraph 4, that the plaintiff was riding along Jalan Tunku Putra **towards Kulim,** when the 1st defendant drove the m/lorry so negligently or recklessly from the **opposite** direction, as to cause the m/lorry to collide into the plaintiff, resulting in loss, damage, severe and permanent total disabilities to the plaintiff. The particulars of negligence set out in the statement of claim at paragraph 6, under (c), (d), (e) and (f) clearly assert that the 1st defendant was coming from the **opposite** direction. For ease of comprehension, I quote the said particulars of negligence.

(c) Encroaching on to the plaintiff's side of the road.

(d) Failing to keep to the proper side.

(e) Failing to heed the approach of the plaintiff or to take adequate notice or to cause the lorry attendant to keep a proper lookout.

(f) Failing to swerve or keep to the proper side to avoid the collision.

It is pertinent to note that the plaintiff had lodged a police report on 26 May 1978, clearly stating that he was riding **from** Kelang Lama **to** Pekan Kulim. For ease of reference, I quote:

> Lebih kurang jam 1.00 p.m. 15 Mac 1978 masa itu saya ada menunggang motosikal PQ 5871 yang baru saya repair daripada Kelang Lama ke Pekan Kulim, lepas itu saya sudah mendapat kemalangan dengan sebuah lorry ...

This police report was never refuted by the plaintiff. It is indeed an agreed document and so is the 1st defendant's police report, dated 15 March 1978. In the 1st defendant's police report, the direction in which the plaintiff was travelling was clearly stated as that from Kelang Lama to Pekan Kulim. In fact, the 1st defendant states that the plaintiff was overtaking a m/vespa which was ahead of the plaintiff. The plaintiff had obviously grazed the m/vespa, swerved from side to centre, encroached into the path of the 1st defendant and knocked into the m/lorry. The relevant portion of the 1st defendant's police report is as follows:

> ... bila saya sampai di Jalan Tunku Putra di depan Sekolah St. Patrick masa itu saya nampak sebuah m/vespa **datang dari arah Kelang Lama ke Pekan Kulim** dan di belakang ada ikut lagi sebuah motosikal yang di belakang potong m/vespa dan terlanggar pada m/vespa yang ia potong itu tetapi tiada jatuh, saya tengok penunggang motosikal itu ke tepi ke tengah dan saya berrekkan m/lorry saya bagi slow, tiba-tiba motosikal itu terus langgar pada m/lorry saya kena pada behagian hadapan m/lorry saya ...

A third police report, at page 5 of the agreed bundle, shows one made by the owner of the motorcycle PQ 5871, which had been ridden by the plaintiff. There are no other police reports made by any other person either on 15 March 1978 or on any other subsequent date.

At the commencement of the trial on 25 January 1995, the plaintiff's Counsel, Mr. Darshan Singh, applied orally to amend paragraph 4 of the statement of claim by deleting the word

"opposite" and inserting therefor the word "same". Defence Counsel did not object and accordingly, the application to amend was allowed. However, no other amendment was applied for. Therefore, the particulars of negligence, remained as pleaded, and so was the direction of travel of the plaintiff, as set out in paragraph 4 of the statement of claim, which was (quote) "along Jalan Tunku Putra, Kulim **towards Kulim**" (emphasis is mine).

The plaintiff, thereafter, gave oral evidence that he was riding in the same direction as the 1st defendant's m/lorry. He testified he heard a sound of "plump" and, thereafter, lost consciousness. On cross-examination, it was put to him that he was coming from the opposite direction and overtaking a m/vespa. He replied **he could not remember** but, upon re-examination, he was very sure that he was knocked from the rear and that he did not overtake a m/vespa before the accident. In fact, he was very categoric that there was no m/vespa that day. In re-examination, he even remembered that he slowed down for pedestrians to cross the street and that the accident occurred before the pedestrian crossing.

In order to corroborate his evidence, the plaintiff produced PW3, Lau Theam Soo, who stated he was 50 yards away and saw everything! He never rendered any aid to the plaintiff even though he knew the plaintiff. He alleges never to have seen the plaintiff after the accident but the plaintiff's previous solicitor had contacted him a year after the accident (that is, in 1979) to testify for the plaintiff. His story is so far-fetched that it seems most improbable he was anywhere near the scene of the accident.

PW3 states that he saw the plaintiff stop at the pedestrian crossing and the m/lorry collided from the rear. When a stationary object, which is not firmly rooted to the ground, is knocked by a moving heavier object, the stationary object would inevitably be flung some distance in front of the moving object or dragged along with it. However, this does not appear to be so in this case, as seen from the police photographs produced by the defence (exhibit D10AD). In fact, the m/cycle is right in front of the m/lorry. The RIMV report of the m/cycle (exhibit D12) seems to reflect greater damage to the front of the m/cycle.

PW3 also stated that he heard the m/lorry's driver say that the brakes of the m/lorry were not good. However, the RIMV report on the m/lorry (exhibit D11) does not corroborate this. I find PW3 not a reliable witness at all. As for the plaintiff, he has contradicted himself in his testimony on several material particulars and has been shown to be incapable of being a good witness. Therefore, in deciding on the issue of liability, reliance must be placed on the silent documentary evidence, that is, the police reports, sketch plan, key and the photographs which speak louder than words.

No adverse inference can be drawn against the defendants for not adducing any evidence through the driver of the m/lorry. The 2nd defendant's director had confirmed that the 1st defendant, that is, the driver of the m/lorry had left his employment sometime ago and all attempts to locate him, even by the insurers' representative, proved futile. In any event, the burden to prove the plaintiff's case falls squarely on the plaintiff's shoulder. It is not for the defendants to prove that they were not negligent.

The plaintiff's pleadings seem to indicate that the plaintiff is uncertain how the accident occurred. However, I am of the opinion he is fully aware that he is the author of his own misfortune but is attempting to make out a case against the defendants.

On the one hand the plaintiff is attempting to contend that he was collided into from the rear by the 1st defendant's m/lorry when **both vehicles** were proceeding **from** Kulim in the

same direction and yet the particulars of negligence allege **encroachment** by the 1st defendant **from** the **opposite direction**. Nevertheless, paragraph 4 of the statement of claim states that both vehicles were proceeding **towards** Kulim.

I find as a fact that the plaintiff **was not proceeding from Kulim** but riding his m/cycle **in the direction of Pekan Kulim.** I further find as a fact the m/lorry was proceeding from Kulim **in the direction of Kelang Lama** and the **accident happened wholly** on the **plaintiff's wrong side of the road** based on all the silent evidence alluded to earlier (see particularly the sketch plan, exhibit D9). There is no evidence of contributory negligence on the part of the 1st defendant. In fact, the plaintiff specifically admitted, under cross-examination, that he was wholly to blame for this collision. He attempted to extricate himself from the consequences of this admission, in re-examination, but, unfortunately for him, his own pleadings and the silent evidence in this case, do not help him at all.

Having carefully studied all the documentary evidence and the oral evidence of the plaintiff and his star witness, PW3, I am of the considered view the plaintiff was the sole author of his misfortune. The RIMV report on the m/cycle indicates that both the front and rear tyres of the m/cycle were deflated. Perhaps, this could have led to his misfortune as well, in that he was unable to control his m/cycle while he was overtaking the m/vespa in front of him and consequently, not only grazed into the m/vespa, but also, went on to the wrong side of the road and collided into the front of the 1st defendant's m/lorry. In the circumstances, I dismiss the plaintiff's claim with costs.

I shall proceed to assess damages on 100% liability under the following heads:

a) *Pain and suffering and loss of amenities.*

The plaintiff allegedly suffered the following injuries and disabilities.

1) Abrasions, on face, chest, abdomen, and left lower orbital region.
2) Lacerations - 2cm. over left eyebrow, 2 1/2cm. over right eyebrow and both knees.
3) Compound fracture right femur.
4) Compound fracture left femur.
5) Compound fracture right radius and ulna.
6) Loss of consciousness and cerebral contusion.
7) 3rd & 6th Nerve Palsy.
8) Left hemiparesis with abnormal reflexes (spastic weakness).
9) Muscle wasting on left side.
10) Spastic shuffling gait.
11) Shortening of right leg 3/4 in., shortening of left leg by 1 inch.
12) Brain damage with "mental retardation".

The plaintiff's injuries are contained in the medical reports at pages 8 to 10 of the agreed bundle and in the medical reports marked exhibits P1, P2, P3, P4 and D5. His disabilities arising from the injuries are stated under Dr. Bell's "conclusions" in his report exhibit P2 and at page 4 of the specialist report (exhibit P1) of Dr. Varughese Thomas, as well as the letter of Dr. P.F Samuel Easaw (exhibit P4).

Dr. Varughese Thomas (PW2) testified for the plaintiff. He is a Consultant Physician in Psychological Medicine. His report, exhibit, P1, is dated 27 December 1994. He had seen the plaintiff on 25 October 1994, 28 October 1994, 7 December 1994 and 15 December 1994. He had also interviewed the plaintiff's mother. Most of Dr. Varughese's findings are subjective and, in cross-examination, he admitted the contents of paragraphs 1, 2, 4 and the last paragraph of his report at page 2, including his assessment of a post traumatic personality change and worsening of social behaviour, was based on information given to him either by the plaintiff or his mother. The result of the CT scan (exhibit D5) carried out on the plaintiff was normal. Dr. Samuel Easaw saw the plaintiff on 5 December 1994 and in his letter (exhibit P4) to Dr. Varughese noted that the plaintiff exhibited some element of functional symptoms, that is, symptoms **without an underlying physical cause**, and suggested a link between those and an impending Court case or claim for compensation. The plaintiff's mother (PW4) made no comments on the alleged coarsening of plaintiff's behaviour. In view of the results of the CT scan, and Dr. Samuel Easaw's observations for which Dr. Varughese was unable to give any explanation, I find that the plaintiff has not proved that he did in fact suffer a post traumatic personality change or his social behaviour has changed. The plaintiff's IQ is, in the assessment of his own specialist, still within the lower level of the normal range of the average population. He is, therefore, not considered retarded. Dr. Varughese also admitted that he did not think the plaintiff needed actual help to eat, bathe or change.

Although Dr. Bell in his report (exhibit P2) noted disturbance of vision in the plaintiff's left eye, this is not mentioned in any of the other medical reports. There is no evidence this was caused by the accident.

Based on the medical evidence and reports produced by the plaintiff, I find that the plaintiff did suffer from multiple fracture (right and left femur, right radius and ulna) shortening of the legs, abrasions, lacerations, and is also left with residual hemiparesis (weakness of left side). It is my finding that there is a large degree of overlapping between these injuries. Guided by the authorities cited, I assess the sum of RM60,000 for pain and suffering and loss of amenities.

b) *Cost of nursing care*

Dr. Varughese claimed that the plaintiff required supervision and was incapable of leading an independent life and yet stated the plaintiff did not need actual physical help to eat, bath and change. The plaintiff is living with his mother and is being well taken care of and appears as if he does not require any nursing care. Nevertheless, I am of the view an award for nursing care should be given assessed at the rate of RM50 per month for 16 years amounting to RM9,600.

c) *Loss of earnings*

The plaintiff who was 20 years old on the date of the accident alleged that he was working as a mechanic with a monthly salary of RM380 prior to the accident. However, his employer from Kulim Motors was never called to testify nor was any other documentary evidence of

his alleged income produced. Therefore, I would not award him any pre-trial loss of earnings but assess his future loss of earnings at the rate of, RM250 per month for 16 years amounting to RM48,000.

d) *Dr. Varughese cost of RM10,000*

Dr. Varughese's bill and receipt for his charges were produced as exhibits P6 and P7. It is in respect of "Clinical Interview, Expert Report and Advice". The plaintiff's solicitors paid the bill and no evidence was led that the plaintiff was under a liability to repay the sum to the solicitors. I would not allow this item.

e) *Other items of special damages*

No evidence was led at all with regard to items (c), (d) and (e) in the particulars of special damage, that is, costs of special food, the loss of m/cycle and loss of clothing. Therefore, there shall be no award for special damages.

In summary, the quantum of damages is assessed as follows:

General damages

a) Pain and suffering and loss of amenities	-	RM 60,000 with interest at 8% from date of service of the writ.
b) Loss of earnings (future loss)	-	RM 48,000
c) Nursing care	-	RM 9,600
		RM117,600
Special Damages	-	Nil.

The plaintiff's claim is dismissed with costs.